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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL HOSTIA, Defendant and Appellant.	H044841 (Santa Clara County Super. Ct. No. C1523276)

I. INTRODUCTION

Appellant Michael Hostia was convicted by a jury of possession of a controlled substance (methamphetamine) after a specified prior conviction (Health & Saf. Code, § 11377, subd. (a)) and misdemeanor possession of burglary tools (Pen. Code, § 466).[1] The trial court sentenced him to a total term of 32 months in prison.

On appeal, defendant argues that the jury was incorrectly instructed on what items may constitute "burglary tools" because the trial court did not specify that a rock, gloves, a tire iron, a key, and whole spark plugs cannot qualify as burglary tools under the definition set forth under section 466. Defendant also argues that his trial counsel rendered ineffective assistance by failing to object to the prosecutor's use of defendant's probationary status for impeachment evidence. Lastly, he claims that the court erroneously imposed penalty assessments on his drug program fee (Health & Saf. Code,

[1] Unspecified statutory references are to the Penal Code.

§ 11372.7, subd. (a)) and criminal laboratory analysis fee (Health & Saf. Code, § 11372.5).

As we explain, we find no merit in defendant's contentions. The trial court's instruction on the crime of possession of burglary tools was not erroneous. Moreover, defense counsel did not render ineffective assistance when he failed to object to the introduction of defendant's probationary status as impeachment evidence, and the court properly imposed the challenged penalty assessments. However, we conclude that the trial court failed to set forth the statutory bases of the imposed penalty assessments. We therefore direct the trial court clerk to amend the abstract of judgment and affirm the judgment as modified.[2]

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Information*

On January 28, 2016, defendant was charged by information with possession of a controlled substance (methamphetamine) (Health & Saf. Code, § 11377, subd. (a); count 1) and misdemeanor possession of burglary tools (§ 466; count 2). It was alleged as to count 1 that defendant had previously been convicted of violating former section 288a, subdivision (c)(2), which required him to register as a sex offender under section 290, subdivision (c). The information also alleged that defendant had a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12) for violating former section 288a, subdivision (c)(2) and had served three prior prison terms (§ 667.5).

Before the start of trial, defendant admitted the prior strike allegation. He also waived his right to a jury trial on his prior prison terms.

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[2] Defendant's appellate counsel has filed a petition for writ of habeas corpus, which this court ordered considered with the appeal. We have disposed of the habeas petition by separate order filed this day. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

B. ***Motions In Limine***

Before trial, the prosecutor filed a motion in limine seeking to introduce into evidence all of defendant's prior convictions should he testify on his own behalf. Two of the prior convictions that the prosecutor sought to introduce were a conviction for possession of a controlled substance (Health & Saf. Code, § 11377) and possession of an injection or ingestion device (Health & Saf. Code, § 11364). Defendant was on probation for these two convictions when he was arrested for the current charges. In her motion, the prosecutor acknowledged that these two convictions were not for crimes of moral turpitude, but she argued that they were relevant to defendant's credibility since convictions for the current charges would likely violate defendant's probation.

Defense counsel filed a motion in limine seeking to exclude evidence that defendant was on parole and was required to register as a sex offender under section 290, subdivision (c) at the time of his arrest.

During the hearing on the parties' motions in limine, the trial court asked the prosecutor if she intended to introduce defendant's convictions for Health and Safety Code sections 11377 and 11364 because defendant "would suffer additional consequence of probation violations if he is convicted of this new offense [*sic*]." The prosecutor answered "[y]es" and further explained that the evidence would be relevant to "[defendant's] bias in testifying." Both the court and the prosecutor acknowledged that neither of these two convictions involved crimes of moral turpitude. The court, however, stated that it would admit evidence of both convictions because defendant would "potentially suffer additional consequences if he's convicted of this particular 11377."

Next, the trial court considered defense counsel's request to exclude evidence that defendant was on parole and was required to register as a sex offender under section 290, subdivision (c). The prosecutor argued that the evidence was probative of why the arresting officer searched defendant. Defendant's trial counsel stated that he would not

be "seeking to argue an opinion about whether [defendant] was treated unfairly or searched unfairly against the Constitution of the United States," so defendant's parolee status was not relevant. After considering the parties' arguments, the court excluded the evidence.

Subsequently, the trial court ruled that questions about defendant's prior convictions for violating Health and Safety Code sections 11377 and 11364 should be restricted to "getting to the point that [defendant] could suffer additional consequences if he is convicted" and any inquiry "should be very limited so as not to emphasize his probation status."

C. *The Trial*

1. *The Prosecution's Case*

In October 2015, San Jose Police Department Officer Aidan Guy stopped a black Toyota sedan after observing it commit a Vehicle Code violation. As Officer Guy initiated the traffic stop, he saw the driver, later identified as defendant, move inside the car as if he was reaching around into a compartment.

Officer Guy searched defendant. Inside defendant's pants pocket, he found a plastic bag containing an off-white crystalline substance. When Officer Guy removed the bag, some of the white substance fell to the floor. There was enough of the white substance for Officer Guy to conduct a field test, and the test results came back presumptively positive for methamphetamine. Inside the car's center console, Officer Guy found another bag containing a similar white substance. Officer Guy opined that the amount of drugs found in these two bags was usable.

Aside from the bags containing methamphetamine, Officer Guy found other items on defendant's person and inside of his car. Inside defendant's jacket pocket, he found two porcelain spark plugs, a small bag containing multiple keys, and a rock. Officer Guy explained that porcelain chips from spark plugs can be used to break car windows.

Officer Guy also opined that the rock could be used to chip off pieces from spark plugs and break open various compartments inside of cars.

Officer Guy found other items inside of defendant's car, including a metal object with electrical tape stuck to one end, which he likened to a shaved key. Officer Guy opined that this item could be used to pick car locks and defeat ignition locking devices. The object had abrasions on it, which signified to Officer Guy that the object had contacted another metallic object. Officer Guy also found a pry bar and a coat hanger that had been bent to a hook on one end. Officer Guy opined that the coat hanger could be inserted inside a partially opened window to manipulate the car's door handle and lock. Officer Guy described the coat hanger as a "Slim Jim device." Lastly, Officer Guy found a pair of gloves, which he explained could be used to conceal a suspect's identity during the commission of a crime.

After Officer Guy finished testifying, defense counsel made a "hybrid motion for judgment [of] acquittal and request for a specific jury instruction . . . ." In a written motion, defense counsel argued that a judgment of acquittal under section 1118.1 was warranted because the rock, whole spark plugs, and gloves that were found in defendant's car were not burglary tools within the meaning of section 466. The written motion requested that "a judgment of acquittal as to those items should be entered and the jury should be instructed that these items were determined not to be burglary tools within the meaning of Penal Code § 466." To support his motion, defense counsel relied on *People v. Diaz* (2012) 207 Cal.App.4th 396 (*Diaz*).

The trial court, after considering *Diaz*, denied defense counsel's motion for an acquittal under section 1118.1. The court further denied defense counsel's request for a specific jury instruction clarifying that the jury could not consider the rock, spark plugs, and gloves to be burglary tools.

2. *The Defense*

Defendant testified on his own behalf. He described the Toyota sedan as his "project car" and admitted that it was in a general state of disarray. Defendant acknowledged that he was a methamphetamine user and stated that he had been struggling with addiction issues at the time of his arrest. He said that the bag containing methamphetamine, which was found in his jacket pocket, was trash. The bag had previously contained methamphetamine, but defendant had already smoked the drugs and had given the rest of it away. Defendant, however, believed there may have been some methamphetamine residue left in the bag. Defendant said he had never seen the bag containing methamphetamine that was found in his car's center console. According to defendant, other people, including friends, had access to his car prior to his arrest.

Defendant explained that the rock that Officer Guy found was taken from his father's funeral plot and was kept in a handcrafted leather pouch. One of the spark plugs that Officer Guy found had been taken from the first car that defendant had ever tuned up, which was the same car that his father last drove before his death. The other spark plug had been taken from the car that defendant had been driving—the Toyota sedan.

Defendant described the metal object with the electrical tape stuck to one end as a special device he used to open his car trunk. In fact, when officers searched defendant's car during the traffic stop, they encountered problems opening the trunk until defendant instructed them on how to do so.

The tire iron and the coat hanger were found in defendant's trunk. The tire iron was part of a kit that defendant had to help change tires. He had used the coat hanger, which Officer Guy had described as a slim jim, to gain access to his own car after he had inadvertently locked it with the keys inside.

Defendant said that the key that Officer Guy found was for his other car, a Mazda pickup. The gloves that were found were gloves that he wore when he worked on tearing

roofs. Defendant could not recall exactly where the gloves were found but believed they may have been underneath the passenger seat. Defendant explained that he was living out of his car, which is why many of his clothes and personal effects were inside of it when he was arrested.

On cross-examination, the prosecutor asked defendant, "[A]t the time that this happened, were you on probation for possession of methamphetamine in violation of Health and Safety Code 1277 [*sic*]?" Defendant answered, "I was on court probation, yes."

Todd Hoffman, an investigator for the Santa Clara County Independent Defense Office, testified on behalf of the defense as an expert in the identification of methamphetamine and what qualifies as a usable quantity of methamphetamine. Hoffman opined that 0.01 grams and 0.08 grams of methamphetamine were not usable quantities, and anything less than 0.1 grams would not be usable. The prosecutor, however, presented evidence that Hoffman had previously arrested someone for possessing 0.1 grams of methamphetamine.

3. *The Prosecution's Rebuttal*

Sergeant David Benner was called as a rebuttal witness on behalf of the prosecution and was designated as an expert in the areas of recognizing methamphetamine and identifying what qualifies as a usable quantity of methamphetamine. Sergeant Benner opined that quantities of methamphetamine as small as 0.04 grams were usable. He also opined that methamphetamine users often keep used methamphetamine bags to ingest traces of drugs that may have been left behind.

Over defense counsel's objection, Sergeant Benner conducted a sugar packet demonstration in front of the jury. Sergeant Benner took a sugar packet, which he said contained approximately 1 gram of sugar, and divided it into 10 piles on a piece of black paper. According to Sergeant Benner, this demonstration depicted what 0.1 grams of

sugar would look like. Sergeant Benner also divided one of the 0.1 gram piles in half, showing what 0.05 grams would look like. Sergeant Benner opined that the 0.05 gram pile was usable, because that amount was substantial enough to manipulate, put in a pipe, and ingest by various means.

4. *Closing Arguments*

During her closing argument, the prosecutor insisted that defendant was guilty of possession of burglary tools. The prosecutor reiterated that Officer Guy had found the coat hanger, which he had described as a slim jim, and defendant was found with readily accessible ceramic or porcelain spark plug chips or pieces. The prosecutor stated that burglary tools are "[i]tems that are used to break into a car with the intent to enter or break into a vehicle" and are possessed "to use them to break into a car." For example, the prosecutor explained that rocks could be used to break spark plugs, and spark plug chips are used to break into cars. She also argued that a tire iron could be used to pry open a glove box and other pieces of plastic inside of cars.

During his closing argument, defense counsel reiterated that burglary tools must be tools that are possessed with "the specific intent to break into a vehicle." Defense counsel argued that the rock was an ordinary rock with no indication it was used for a vehicle burglary, the key and gloves that were found were not similar to any of the enumerated items in section 466, and the law specifically lists chips or pieces of spark plugs and not whole spark plugs. Moreover, defense counsel argued that the tire iron was found in defendant's trunk, and it was speculative that the tire iron could be used to pry open compartments in the interior of cars.

D. *The Verdict and Sentencing*

On March 23, 2016, the jury found defendant guilty of both possession of a controlled substance (methamphetamine) (Health & Saf. Code, § 11377, subd. (a)) and

misdemeanor possession of burglary tools (§ 466). The trial court found all of the prior conviction allegations to be true.

On January 20, 2017, defendant filed a motion requesting that the trial court exercise its discretion to reduce his conviction for possession of a controlled substance to a misdemeanor under section 17 and dismiss his prior strike conviction in the interests of justice under section 1385 and *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. The court denied both motions.[3] The court, however, struck one of defendant's prior prison terms (§ 667.5) pursuant to section 1385. Thereafter, the court sentenced defendant to a total term of 32 months in prison.

The trial court also ordered defendant to pay the following fines and penalty assessments: "A $50 criminal lab analysis fee plus penalty assessment is imposed pursuant to Section 11372.5 of the Health and Safety Code. [¶] $150 drug program fee, plus penalty assessment is imposed pursuant to Section 11372.7 of the Health and Safety Code. [¶] And [an] AIDS education fine of $30 plus penalty assessment is imposed pursuant to Section 11377(b) of the Health and Safety Code." The clerk's minutes and the abstract of judgment reflect that the criminal laboratory analysis fee was subject to a $155 penalty assessment, the drug program fee was subject to a $465 penalty assessment, and the AIDS education program fine was subject to a $93 penalty assessment. Both the clerk's minutes and the abstract of judgment refer to the imposed penalty assessments using the shorthand, "PA."

III. DISCUSSION

Defendant raises three arguments on appeal: (1) the trial court erred because it did not instruct the jury that rocks, gloves, tire irons, keys, and whole spark plugs are not

[3] Defendant's opening brief incorrectly states that the trial court granted his *Romero* motion.

burglary tools under section 466, (2) his trial counsel was ineffective for failing to object to the prosecution's introduction of evidence of his probationary status, and (3) the trial court erroneously imposed penalty assessments on his criminal laboratory analysis fee and the drug program fee. We address each of defendant's contentions in turn.

A. *The Jury Instruction on Burglary Tools*

During trial, defense counsel requested that the trial court instruct the jury that a rock, whole spark plugs, and gloves cannot be considered burglary tools under section 466. The trial court denied this motion. On appeal, defendant argues that the court erred in declining to give this requested instruction. As we explain, we reject defendant's claim of instructional error.

1. *Forfeiture*

Preliminarily, the Attorney General claims that defendant forfeited part of his argument by failing to make specific objections below. Defendant's written motion requested that the trial court instruct the jury that three types of items, whole spark plugs, rocks, and gloves are not burglary tools within the meaning of section 466. During trial, defense counsel reiterated his written motion and requested a specific jury instruction related to the whole spark plugs, rocks, and gloves. On appeal, defendant *additionally* argues that the court should have instructed the jury that the key and tire iron were also not burglary tools under section 466. The Attorney General insists that defendant's failure to include these two items (the key and the tire iron) in his objections below forfeits any argument pertaining to these items on appeal.

We disagree. As our Supreme Court has explained, "failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal." (*People v. Lee* (2011) 51 Cal.4th 620, 638.) However, no objection is necessary if the instruction contained an incorrect statement of law or affected the defendant's substantial rights. (See *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; § 1259.)

Here, defendant argues that the trial court's failure to give the clarifying instruction reduced the prosecution's burden of proof at trial, implicating his constitutional rights. Since he claims that the trial court's failure to give clarifying instructions affects his substantial rights, we must evaluate all his arguments on the merits. Having found no forfeiture, we proceed to address the merits of his claims.

2. *Section 466 and the Instruction Given to the Jury*

Section 466 provides in pertinent part: "Every person having upon him or her in his or her possession a picklock, crow, keybit, crowbar, screwdriver, vise grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, bump key, floor-safe door puller, master key, ceramic or porcelain spark plug chips or pieces, or other instrument or tool with intent feloniously to break or enter into any . . . vehicle as defined in the Vehicle Code . . . is guilty of a misdemeanor."

The following instruction was given to the jury: "The defendant is charged in Count 2 with possession of burglary tools, in violation of Penal Code section 466. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant possessed: [¶] A picklock, crow, keybit, crowbar, screwdriver, vise grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, bump key, floor-safe door puller, master key, ceramic or porcelain spark plug chips or pieces, or other similar instrument or tool [¶] AND [¶] 2. With the intent to break or enter a vehicle. [¶] A person does not have to actually hold or touch something, to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person."

3. *General Legal Principles Governing Jury Instructions*

"In a criminal case, a trial court has a duty to instruct the jury on ' " ' "the general principles of law relevant to the issues raised by the evidence." ' " ' " (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) A trial court also has "the duty to screen out invalid

theories of conviction, either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.)

"In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights." (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585.) " ' "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." ' " (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248; *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1061.) "The reviewing court also must consider the arguments of counsel in assessing the probable impact of the instruction on the jury." (*People v. Young* (2005) 34 Cal.4th 1149, 1202 (*Young*).) "In addition, ' " 'we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' " ' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 915.)

4. *There Was No Instructional Error*

Section 466 contains a list of enumerated burglary tools *and* a more general statement that "other instrument[s] or tool[s]" may also constitute burglary tools.[4] Defendant argues the trial court prejudicially erred when it failed to instruct the jury that neither whole spark plugs, a rock, a tire iron, a key, nor gloves can be considered an "other instrument or tool" under section 466. Citing *Diaz*, *supra*, 207 Cal.App.4th at page 404, defendant claims that "other instruments or tools" must be limited to those

[4] Defendant argues that whole spark plugs, a rock, a tire iron, a key, and gloves are not specifically enumerated in the statute, and we agree. Section 466 specifically identifies items that can be considered burglary tools. None of the items challenged by defendant on appeal are included in section 466's list.

items that can be used in a manner similar to the items specifically enumerated in section 466. In short, the "tool must be for the purpose of breaking, entering, or otherwise gaining access to the victim's property." (*Diaz*, *supra*, at p. 404.) In addition, defendant claims that the prosecution's burden of proof at trial was lessened because no clarifying instruction was given, which would have informed the jury that it could only consider defendant's possession of unenumerated items as evidence of his burglarious intent. (See *People v. Southard* (2007) 152 Cal.App.4th 1079, 1088.)

The California Supreme Court recently considered the elements of the crime of possession of burglary tools under section 466. (*In re H.W.* (Mar. 28, 2019, S237415) __ Cal.5th __ , __ [2019 Cal. Lexis 2042 *1-*2] (*H.W.*).) In *H.W.*, the minor challenged the juvenile court's finding that he possessed a burglary tool within the meaning of section 466 after he was found inside of a store with pliers that he had used to remove an anti-theft tag from a pair of jeans. (*H.W.*, *supra*, at pp. __ [at pp. *3-*4].) On appeal, the minor argued there was insufficient evidence that he possessed the pliers with the felonious intent to commit a burglary. (*Id.* at pp. __ [at pp. *4-*5].) The appellate court disagreed, concluding that the pliers were an "other instrument or tool" for the purposes of section 466 because they were possessed with the intent to be used for burglary. (*H.W.*, *supra*, at p. __ [at p. *5].)

The California Supreme Court reversed the appellate court's decision. (*H.W.*, *supra*, __ Cal.5th at pp. __ [2019 Cal. Lexis 2042 at pp. *14-*15].) The Supreme Court observed that the minor argued that pliers were not specifically listed in the statute, and the principle of *ejusdem generis* limited section 466's "other instrument or tool" provision to tools that are similar to the enumerated tools, that is, "tools designed for breaking or entering." (*H.W.*, *supra*, at p. __ [at p. *10].) The Supreme Court concluded, however, that even if the pliers were properly considered to be an "other instrument or tool" within the meaning of section 466, the minor's intent was dispositive. (*H.W.*,

supra, at p. __ [at p. *11].) Interpreting the statute in context, the Supreme Court determined that section 466 requires the specific intent to use the " 'instrument or tool' to break or otherwise effectuate physical entry into a structure in order to commit theft or some other felony within the structure." (*H.W.*, *supra*, at p. __ [at p. *14].) Since the record was devoid of evidence that the minor possessed the pliers with the intent to use them for any purpose other than to remove the anti-theft tag from a pair of jeans, the Supreme Court determined that insufficient evidence supported his conviction. (*Ibid*.)

Although the California Supreme Court's decision in *H.W.* clarified the specific intent necessary to violate section 466, it left undecided whether an "other instrument or tool" must be *similar* to the tools expressly enumerated in the statute, in other words, must be *designed* for breaking and entering. (*H.W.*, *supra*, __ Cal.5th at pp. __ [2019 Cal. Lexis 2042 at pp. *10-*11].) *Diaz*, *supra*, 207 Cal.App.4th 396, upon which defendant relies, interpreted section 466 and found *People v. Gordon* (2001) 90 Cal.App.4th 1409 (*Gordon*) persuasive on this issue. (*Diaz*, *supra*, at p. 403.)

In *Gordon*, the defendant was found with ceramic spark plug pieces and was convicted of possession of burglary tools under section 466. (*Gordon*, *supra*, 90 Cal.App.4th at p. 1411.) At the time *Gordon* was decided, section 466 did not specifically list spark plug chips or pieces as an enumerated burglary tool. (*Gordon*, *supra*, at p. 1412.) *Gordon* applied the principle of *ejusdem generis*, which, as previously described, provides that a general term that follows a list of specific items is " ' "restricted to those things that are similar to those which are enumerated specifically." ' " (*Ibid*.) At that time, none of the enumerated items in section 466 were meant to break or cut glass; the items were meant to pry open locks, pick locks, or pull locks up. (*Gordon*, *supra*, at p. 1412.) Thus, *Gordon* concluded that spark plug pieces were *not* an instrument or tool under section 466. (*Gordon*, *supra*, at p. 1412.)

Ultimately, the Legislature amended section 466 following the decision in *Gordon* by adding "ceramic or porcelain spark plug chips or pieces" to the statute. (Stats. 2002, ch. 335, § 2, p. 1298.) In making this amendment, however, the Legislature expressly specified that it did not intend to include "other common objects such as rocks or pieces of metal that can be used to break windows." (*Ibid*.)

In *Diaz*, the appellate court observed that following *Gordon*, the Legislature amended section 466 to include ceramic or porcelain spark plug chips or pieces. (*Diaz*, *supra*, 207 Cal.App.4th at p. 403.) The Legislature, however, did not amend section 466 to remove *Gordon*'s requirement of "similarity of purpose and design." (*Diaz*, *supra*, at p. 404.) *Diaz* thus concluded that section 466 "is limited to instruments and tools used to break into or gain access to property in a manner similar to using items enumerated in section 466" and created "for the purpose of breaking, entering, or otherwise gaining access to the victim's property." (*Diaz*, *supra*, at p. 404.) *Diaz* also held that "is it not enough that a common implement may be used for breaking and entering, given the Legislature itself has specified its intent was 'to add only ceramic or porcelain spark plug chips or pieces, not other common objects such as rocks or pieces of metal that can be used to break windows, to the list of burglary tools in Section 466 of the Penal Code.' " (*Ibid*.)

In *H.W.*, the California Supreme Court has determined that a violation of section 466 requires a specific intent to use the " 'instrument or tool' to break or otherwise effectuate physical entry into a structure in order to commit theft or some other felony within the structure." (*H.W.*, *supra*, __ Cal.5th at p. __ [2019 Cal. Lexis 2042 at p. *14].) And, under *Diaz*, the term "other instrument or tool" is limited to those tools that are created "for the purpose of breaking, entering, or otherwise gaining access to the victim's property." (*Diaz*, *supra*, 207 Cal.App.4th at p. 404.) Assuming that *Diaz*'s interpretation of section 466 is correct, the trial court's refusal to give defendant's

proposed instruction was not erroneous. The court's instruction on section 466 adequately stated the relevant law, and there was no reasonable likelihood the instruction confused or misled the jury. (See *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 182.)

First, the language of the given jury instruction ameliorates most of defendant's concerns. Instead of reciting section 466 verbatim, the instruction stated that the jury must find that the "other instrument or tool" be "similar" to the ones enumerated in the statute. In other words, the jury instruction given here *already* incorporated the principle of *ejusdem generis* employed in *Diaz* and *Gordon*. (*Diaz, supra*, 207 Cal.App.4th at p. 404; *Gordon*, *supra*, 90 Cal.App.4th at p. 1412.) The common thread between the enumerated items in section 466 is that they are all items that are designed and used with the purpose of gaining entry or access to a victim's property, whether it be by breaking glass (spark plug chips or pieces) or by prying or pulling open locks (slim jims, picklocks). Logically, the only way for the jury to reach the conclusion that the challenged items were *similar* to the items enumerated in section 466 would be if they determined that the items were designed and meant to be used to gain access to property.

Additionally, the jury was instructed that the "other similar instrument or tool" must be possessed "[w]ith the intent to break or enter a vehicle." We acknowledge that to strictly conform the jury instruction with the specific intent element described by the California Supreme Court in *H.W.*, the instruction should have been worded to say that the other tools or instruments must have been possessed with the intent to *use* those tools or instruments to break or enter a vehicle. (See *H.W., supra*, __ Cal.5th at p. __ [2019 Cal. Lexis 2042 at p. *14].) However, " 'not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is " 'whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process.' " ' " (*People v. Mills* (2012) 55 Cal.4th 663, 677.) Ultimately, we must evaluate jury instructions to determine whether there is a

" ' "reasonable likelihood that the jury . . . understood the charge" in a manner that violated defendant's rights.' " (*People v. Pearson* (2013) 56 Cal.4th 393, 476.) In context, we conclude that it is not reasonably likely that the jury would have divorced the requirement that defendant possess an item qualifying as a burglary tool—that the instructions have already specified must be either one of the enumerated items that are designed to gain access to property *or* similar to the enumerated items—with defendant's *intent* to use that tool to gain access to property.

We further observe that we must "consider the arguments of counsel in assessing the probable impact of the instruction on the jury." (*Young*, *supra*, 34 Cal.4th at p. 1202; see *People v. Garceau* (1993) 6 Cal.4th 140, 189 [possibility of confusion over jury instruction was diminished by closing arguments], disapproved of on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.) Here, during closing arguments the prosecutor reiterated that burglary tools are "[i]tems that are used to break into a car with the intent to enter or break into a vehicle" and are possessed "to use them to break into a car." For example, the prosecutor explained that rocks could be used to break spark plugs, and spark plug chips are used to break into cars. During his closing argument, defense counsel similarly reiterated that burglary tools must be tools that are possessed with the specific intent to break into a vehicle. Thus, even if the jury instruction was somewhat ambiguous, the possibility that the jury may have been confused by the instruction was greatly reduced by the fact that *both* the prosecutor and defense counsel reiterated the *same* intent requirement—that the tool must have been possessed with the intent to use it to break into a car.

Defendant argues that the failure to instruct was prejudicial because we cannot determine whether the jury's verdict was supported by a valid factual basis. Defendant contends that we cannot discern from the record whether the jury found defendant guilty of possessing burglary tools based on his possession of the improvised picklock and slim

jim or whether it found him guilty based on his possession of the items not enumerated in the statute—for example, the rock or the pair of gloves. He thus insists that any error was necessarily prejudicial because the prosecution below presented his possession of these items together as a "burglary tool kit."

We disagree. This is not a case where the prosecution pleaded different legal theories to support a conviction and the record is unclear as to which theory the jury based its determination of guilt. (See, e.g., *People v. Smith* (1998) 62 Cal.App.4th 1233, 1239.) Here, the jury was tasked with making the factual determination as to whether a whole spark plug, a rock, a tire iron, a key, and gloves were "instruments or tools" that were *similar* to the ones enumerated in the statute and possessed with the required intent. "The jury was as well equipped as any court to analyze the evidence and to reach a rational conclusion." (*People v. Guiton, supra*, 4 Cal.4th at p. 1131.) Thus, this is the type of case where "[t]he jurors' 'own intelligence and expertise will save them from' the error of giving them 'the option of relying upon a factually inadequate theory.' " (*Ibid.*) Given the language of the instruction and the arguments of counsel, we do not believe a jury would have construed the instruction in the manner that defendant suggests.

In sum, we conclude that there was no instructional error. Having found no error, we necessarily reject defendant's claim that the prosecution's burden of proof at trial was diminished by the jury instruction.

B. *Defendant's Probationary Status*

Next, defendant argues that defense counsel rendered ineffective assistance when he did not seek to exclude evidence of defendant's probationary status before trial and failed to object to the admission of defendant's probationary status as impeachment evidence during trial. Defendant further argues that defense counsel failed to request an instruction that evidence of his probationary status could only be considered for impeachment purposes.

1. *Legal Principles of Ineffective Assistance of Counsel Claims*

" 'In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it "fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms." [Citations.] Unless a defendant establishes the contrary, we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." [Citation.] If the record "sheds no light on why counsel acted or failed to act in the manner challenged," an appellate claim of ineffective assistance of counsel must be rejected "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." [Citations.] If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ' " (*People v. Lopez* (2008) 42 Cal.4th 960, 966; *Strickland v. Washington* (1984) 466 U.S. 668, 690, 694.)

2. *Defendant Fails to Demonstrate Ineffective Assistance of Counsel*

Defendant first argues that defense counsel rendered ineffective assistance because he did not seek to exclude evidence of defendant's probationary status. Defendant was on probation for a prior conviction for possession of a controlled substance (Health & Saf. Code, § 11377), which is not a crime of moral turpitude. Defendant argues that this evidence was highly prejudicial because he was presently facing the *same* charge—a violation of Health and Safety Code section 11377—and his probationary status was not probative of his character for truth.

We disagree with defendant's characterization of his probationary status as irrelevant. Evidence is relevant if it relates to a witness's credibility. (Evid. Code,

§ 210.) In determining the credibility of a witness, the jury may consider any matter that has a tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to: a witness's character for honesty or veracity or their opposites; the existence or nonexistence of a bias, interest, or other motive; his attitude toward the action in which he testifies or toward the giving of testimony; and his admission of untruthfulness" (Evid. Code, § 780.) Defendant's probationary status was evidence of his bias, interest, or motive to lie to Officer Guy during the initial traffic stop and in his testimony at trial, because he would suffer adverse consequences if he was found to be in violation of his probation.

Defendant cites to cases where the exclusion of evidence of a witness's probationary status has been upheld, like *People v. Brady* (2010) 50 Cal.4th 547, 559-560 (*Brady*) and *People v. Carpenter* (1999) 21 Cal.4th 1016, 1050-1051 (*Carpenter*). The defendants in those cases argued that the witness's probationary status was relevant to their credibility, including the possibility that their respective testimonies were biased. (*Brady, supra,* at p. 560; *Carpenter*, *supra,* at p. 1051.)

In *Brady*, the witness suffered a criminal conviction in the year preceding the defendant's trial, and the defendant sought to impeach the witness's testimony with evidence of the witness's probationary status and intended to argue that the witness may have been seeking leniency from the district attorney's office. (*Brady, supra,* 50 Cal.4th at p. 560.) The defendant, however, made no showing that the witness had been offered leniency or threatened with retaliation by the prosecutor, and the prosecutor was not even aware that the witness was on probation until his criminal record was checked during the defendant's trial. (*Ibid*.) As a result, the *Brady* court determined that the defendant failed to demonstrate the witness's probationary status was relevant to his credibility. (*Ibid*.)

Likewise, in *Carpenter*, the defendant argued that the witness's probationary status in a juvenile matter was relevant to her credibility and sought to cross-examine her

about it during trial. (*Carpenter*, *supra*, 21 Cal.4th at p. 1050.) The trial court limited the scope of the defendant's cross-examination so that the defendant could *not* ask her about her probationary status but could question her about whether she had been offered benefits or promises with respect to the juvenile case. (*Ibid*.) The *Carpenter* court determined that the trial court did not err in limiting testimony on this subject, observing that the defendant was permitted to inquire into whether the witness received any promises or expected benefits with respect to her testimony. (*Id*. at p. 1051.) Moreover, the *Carpenter* court noted that there was no evidence that the witness was on probation at the time she testified three years later. (*Ibid*.)

Brady and *Carpenter* do not aid defendant. The fact that in certain situations the probative value of a witness's probationary status does not outweigh the prejudicial impact of the evidence (Evid. Code, § 352) does not mean that this type of evidence should always be excluded. Whether such evidence is admissible is a discretionary determination made by the trial court after consideration of the specific facts presented in each case. Here, the evidence of defendant's probationary status was relevant for different purposes than the reasons proffered by the defendants in *Brady* and *Carpenter*. Defendant's probationary status was relevant to his own possible bias, and it was evidence that he had a motive to lie during the initial traffic stop with Officer Guy and at trial. It is undisputed that defendant would have suffered consequences had he been found in violation of his probation. Thus, the evidence was relevant to defendant's credibility. (See *People v*. *Adams* (1983) 149 Cal.App.3d 1190, 1193 [finding that witness's probationary status was relevant to impeach testimony for bias, prejudice, and possible motive to cooperate with authorities]; *Davis v*. *Alaska* (1974) 415 U.S. 308, 311-318 [holding that witness's probationary status was admissible to provide basis of claim that witness was biased or was under undue pressure during testimony].)

It follows that since defendant's probationary status was relevant evidence, defense counsel may have made the tactical decision not to object to its introduction because he believed that such an objection would have been overruled. As a result, defendant does not demonstrate that defense counsel was ineffective for failing to object to the evidence's admission.

We do, however, agree that evidence of the specific crime that defendant was convicted of that resulted in his probationary status—a violation of Health and Safety Code section 11377—was irrelevant to defendant's bias or credibility. A violation of Health and Safety Code section 11377, possession of a controlled substance, is not a crime of moral turpitude and, by itself, is inadmissible for impeachment purposes. (See *People v. Castro* (1985) 38 Cal.3d 301, 317 ["a witness' prior conviction should only be admissible for impeachment if the least adjudicated elements of the conviction necessarily involve moral turpitude"].)

Nonetheless, the irrelevancy of this evidence does not render defense counsel deficient for failing to object to its introduction. Defendant overstates the prejudicial impact of the prosecution's disclosure that he had previously been convicted of possession of a controlled substance. Before his prior conviction was introduced, defendant had already testified on direct examination that he was a methamphetamine user and suffered from addiction issues at the time of his arrest. He had also testified that the bag found in his jacket pocket had previously contained methamphetamine and that he had personally used the methamphetamine that had been contained inside. In this context, evidence that he had been previously convicted of possessing methamphetamine would have been largely cumulative. We must defer to defense counsel's reasonable tactical decisions when reviewing claims of ineffective assistance of counsel. (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437 (*Lucas*).) Here, defense counsel may have made the tactical decision not to object and draw more attention to defendant's criminal record.

We also disagree with defendant's argument that defense counsel's willingness to seek to exclude evidence of defendant's parolee status and his status as a registrant under section 290, subdivision (c) demonstrates that there can be no rational, tactical basis for his failure to object to admission of his probationary status. It is possible that defense counsel made the tactical decision to seek to exclude evidence of defendant's parolee status and status as a registrant under section 290, subdivision (c), because defense counsel reasonably determined that this evidence was highly prejudicial and not probative. The prosecutor had already sought to impeach defendant's credibility with evidence of his probationary status, rendering evidence of defendant's parolee status largely cumulative. Defense counsel may have also reasonably determined that the fact that defendant was on parole was more prejudicial than the fact that he was on probation, because his status on parole implied that he been previously incarcerated. As a result, defendant fails to demonstrate there can be no rational, tactical decision for defense counsel's acts or omissions in this regard. (*Lucas*, *supra*, 12 Cal.4th at pp. 436-437.)

Lastly, defendant argues that competent counsel would have requested that the jury be instructed that evidence of defendant's probationary status could only be considered for the limited purpose of determining his credibility. Again, defendant fails to demonstrate his counsel's omission was unreasonable. Our Supreme Court has "repeatedly stressed 'that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' " (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Here, defense counsel may have reasonably concluded that the risks of having a limiting instruction—which may have emphasized the existence of the evidence or impliedly suggested that the evidence was particularly probative—did not outweigh the benefits such an instruction would have provided.

In sum, we find no merit in defendant's claim of ineffective assistance of counsel.

C. Defendant's Fees and Penalty Assessments

Defendant argues that penalty assessments were erroneously imposed on his drug program fee (Health & Saf. Code, § 11372.7, subd. (a)) and his criminal laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)). Defendant insists that these two fees are administrative and not punitive.

1. *Failure to Set Forth Statutory Bases for Penalty Assessments*

Preliminarily, we observe that the abstract of judgment in this case sets forth the statutory bases for defendant's fines and fees, but it fails to specify the statutory bases for all the penalty assessments that were imposed on the drug program fee (Health & Saf. Code, § 11372.7, subd. (a)), the criminal laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)), and the AIDS education program fine (Health & Saf. Code, § 11377, subd. (b)). We have examined the transcript of the sentencing hearing and the probation report, and there is nothing in the record to indicate the bases for the penalty assessments imposed in this case. It is settled that failure to identify the statutory bases for the penalty assessments contravenes California law, which "require[s] the court clerk to list . . . the amount and statutory basis for each penalty assessment in the abstract of judgment." (*People v. Hamed* (2013) 221 Cal.App.4th 928, 940 (*Hamed*); *People v. Sharret* (2011) 191 Cal.App.4th 859, 864 (*Sharret*); *People v. High* (2004) 119 Cal.App.4th 1192, 1200.) Moreover, the failure to specify the statutory bases for the penalty assessments results in a legal error at sentencing that can be reviewed on appeal even in the absence of an objection or argument raised below. (*People v. Hartley* (2016) 248 Cal.App.4th 620, 637.)

Neither party addressed this issue in their appellate briefs, so we requested supplemental briefing. In his letter brief, defendant agrees that the trial court's failure to set forth the statutory bases for the penalty assessments was error. The Attorney General

disagrees, insisting that the "record is sufficiently clear as to the statutory bases for the penalty assessments," citing to the probation report and the trial court's statements during the sentencing hearing.

The Attorney General misinterprets the record. The probation report and the trial court's statements at the sentencing hearing clearly set forth the statutory bases for the *fees and fines* that were imposed, but do not specify the statutory bases for the *penalty assessments*.[5] It is an "acceptable practice" to "impose the penalties and surcharge . . . by a shorthand reference to 'penalty assessments.' " (*Sharret, supra,* 191 Cal.App.4th at p. 864.) However, "[t]he responsibility then falls to the trial court clerk to specify the penalties and surcharge in appropriate amounts in the minutes and, more importantly, the abstract of judgment." (*Ibid*.) Such action was not taken here.

We asked the parties whether the abstract of judgment should be modified or if the matter should be remanded to the trial court so that it may state the statutory grounds for

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[5] The probation report recommended the following fines and fees: "[a] $50.00 Criminal Laboratory Analysis Fee, plus penalty assessment, be imposed pursuant to Section 11372.5 of the Health and Safety Code," "[a] $150.00 Drug Program Fee, plus penalty assessment, be imposed pursuant to Section 11372.7 of the Health and Safety Code," "[a]n AIDS Education Fine not to exceed $70.00 plus penalty assessment be imposed pursuant to Section 11377(b) of the Health and Safety Code." Thus, the probation report did not specify the amount of or the statutory bases of the recommended penalty assessments.

At the sentencing hearing, the trial court orally pronounced the following fines and fees: "A $50 criminal lab analysis fee plus penalty assessment is imposed pursuant to Section 11372.5 of the Health and Safety Code. [¶] $150 drug program fee, plus penalty assessment is imposed pursuant to Section 11372.7 of the Health and Safety Code. [¶] And [an] AIDS education fine of $30 plus penalty assessment is imposed pursuant to Section 11377(b) of the Health and Safety Code." Thus, the trial court did not specify the statutory bases of the applicable penalty assessments.

We also observe that both the clerk's minutes of the sentencing hearing and the abstract of judgment specify the amount of penalty assessments imposed on each fine but fail to set forth the specific statutory bases for the penalty assessments. The abstract of judgment refers to the penalty assessments as "PA."

the penalty assessments imposed. Since the Attorney General erroneously believes the statutory bases for the penalty assessments were sufficiently stated, she did not address this question. Although defendant agrees that there was error, he expresses no preference.

We conclude that modification of the judgment is appropriate. Here, the parties do not dispute the aggregate amount of the imposed penalty assessments, and we are able to determine the statutory bases of the penalty assessments. (See *Hamed*, *supra*, 221 Cal.App.4th at pp. 940-941.) The drug program fee, criminal laboratory analysis fee, and AIDS education program fine are subject to a 100 percent state penalty assessment (§ 1464, subd. (a)(1)), a 20 percent surcharge (§ 1465.7), a 50 percent state court construction penalty (Gov. Code, § 70372), a 70 percent additional penalty (Gov. Code, § 76000, subd. (a)(1)), a 20 percent additional penalty for emergency medical services (former Gov. Code, § 76000.5), a 10 percent additional DNA penalty (Gov. Code, § 76104.6, subd. (a)(1)), and a 40 percent additional state-only DNA penalty (Gov. Code, § 76104.7). In sum, defendant's fees and fines are subject to seven penalty assessments totaling 310 percent of the underlying base fees and fines.

We therefore direct the trial court clerk to amend the abstract of judgment to correctly list the statutory bases for the penalty assessments as shown above.

2. *Penalty Assessments Were Properly Imposed on the Drug Program Fee and Criminal Laboratory Analysis Fee*

We now examine whether penalty assessments were properly imposed on defendant's drug program fee (Health & Saf. Code, § 11372.7, subd. (a)) and criminal laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)).

The statutes authorizing the penalty assessments imposed in defendant's case state that penalties shall be imposed "upon every fine, penalty, or forfeiture" levied by the court. (§ 1464, subd. (a)(1); Gov. Code, §§ 70372, 76000, subd. (a)(1), 76104.6,

subd. (a)(1), 76104.7; former Gov. Code, § 76000.5.) The 20 percent surcharge imposed under section 1465.7 does not reference a "fine, penalty, or forfeiture" but provides that a 20 percent surcharge "shall be levied on the base fine used to calculate the state penalty assessment as specified in subdivision (a) of Section 1464." (§ 1465.7, subd. (a).) The issue is whether the drug program fee and criminal laboratory analysis fee are administrative in nature and not subject to penalty assessments or are punitive in nature and subject to penalty assessments.

The Attorney General claims that defendant's argument is now foreclosed by the California Supreme Court's recent decision in *People v. Ruiz* (2018) 4 Cal.5th 1100. *Ruiz* considered whether the drug program fee (Health & Saf. Code, § 11372.7, subd. (a)) and the criminal laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)) constitute "punishment," rendering it permissible to impose these two fees on a defendant who committed a *conspiracy* to commit a drug offense that is specified in the statute establishing these two fees. (*Ruiz, supra*, at p. 1104.) Section 182, subdivision (a)(6), the sanctions provision of the conspiracy statute, provides that those convicted of conspiring to commit a felony "shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony." After considering the legislative history of the statutes enacting both fees, the *Ruiz* court determined that the fees constituted punishment and could be imposed in conspiracy cases. (*Ruiz, supra*, at p. 1119.)

In his reply brief, defendant concedes that *Ruiz* is dispositive of his claim, and we agree. *Ruiz* determined that the drug program fee and criminal laboratory analysis fee are punitive. Since these fees are punitive, they are properly considered a fine, penalty, or forfeiture that are subject to various penalty assessments.

DISPOSITION

The clerk of the trial court is directed to prepare an amended abstract of judgment that itemizes the amount of and statutory bases for each penalty assessment as described in this opinion (a 100 percent state penalty assessment [Pen. Code, § 1464, subd. (a)(1)]; a 20 percent surcharge [Pen. Code, § 1465.7]; a 50 percent state court construction penalty [Gov. Code, § 70372]; a 70 percent additional penalty [Gov. Code, § 76000, subd. (a)(1)]; a 20 percent additional penalty for emergency medical services [former Gov. Code, § 76000.5]; a 10 percent additional DNA penalty [Gov. Code, § 76104.6, subd. (a)(1)]; and a 40 percent additional state-only DNA penalty [Gov. Code, § 76104.7]), and to send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. The judgment is affirmed as modified.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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DANNER, J.

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